IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0273
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ORLANDO J. MENDEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200500984

Honorable Stephen F. McCarville, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Eric J. Olsson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Orlando Mendez was charged with third-degree burglary and theft by control. The trial court sentenced him to concurrent, aggravated prison terms of twelve

and six years. On appeal, Mendez contends the trial court erred by imposing the aggravated terms and asks us to vacate the sentences and remand this matter for resentencing. We affirm.

¶2 The trial court imposed aggravated prison terms after an aggravation-mitigation hearing, during which Mendez's mother, father, brother, sister, and Mendez addressed the court. The transcript of the proceeding supports the state's characterization of Mendez's soliloquy as having been "defiant." The court stated:

> I'm going to find as aggravating factors . . . the defendant had been previously convicted of a felony within 10 years prior to this event; that you'd been convicted of similar offenses in the past because you have 10 property convictions or arrests prior to this date; that this was not an isolated incident, but one of continuing behavior; certainly your actions were unprovoked without reasons; the lengthy prior record and record as a juvenile are included in those set forth above. I will certainly find that you've shown no remorse, Mr. Mendez. You've never shown remorse to the court for anything you've done. There's more than one victim involved, which is actually covered by the fact you were found guilty of each of the two counts; and I've also found you've not benefited from past treatment of the Court.

The court found there existed one mitigating circumstance: the nonviolent nature of the offenses.

¶3 Mendez contends, generally, that the trial court "gave improper weight to aggravating circumstances and disregarded a mitigating circumstance it was obliged to consider." To the extent Mendez is asking this court to reweigh the sentencing factors to determine the propriety of the sentences, this we will not do; it is for the trial court to weigh

the aggravating and mitigating circumstances in the exercise of its broad sentencing discretion. *See State v. Ross*, 166 Ariz. 579, 582, 804 P.2d 112, 115 (App. 1990). Not all aggravating and mitigating circumstances must be given the same weight; rather, it is for the trial court, not this court, to determine how much weight to give each circumstance. *See State v. Brookover*, 124 Ariz. 38, 42, 601 P.2d 1322, 1326 (1979). We have no basis for disturbing the sentences on this ground because they are within statutory parameters, and nothing in the record shows the court abused its discretion in imposing them by acting arbitrarily or capriciously. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).

¶4 Mendez also argues that, although the court could rely on his prior felony convictions as an aggravating factor, "the balance of his criminal record had not been proven beyond a reasonable doubt to a jury and therefore, pursuant to *Blakely v. Washington*, [542 U.S. 296,] 124 S. Ct. 2531 (2004)[,] could not be used to aggravate his sentence," particularly his insufficiently proven juvenile record. But, in *State v. Martinez*, 210 Ariz. 578, ¶ 21, 115 P.3d 618, 624 (2005), our supreme court held that once a *Blakely*-exempt or *Blakely*-compliant factor has been established, the "trial judge has discretion to impose any sentence within the statutory sentencing range." Here, the trial court found Mendez's prior felony conviction was an aggravating circumstance, a factor that is *Blakely* exempt. Additionally, the court relied on the fact that there were two victims, noting correctly that this circumstance was implicit in the jury's verdicts. Therefore, the latter circumstance is

Blakely compliant. Consequently, Mendez was not entitled to have a jury determine the remaining factors beyond a reasonable doubt. There was ample information before the court establishing the additional factors by a preponderance. *See Martinez*, 210 Ariz. 578, ¶ 27, 115 P.3d at 625-26; *see also* A.R.S. § 13-702(D)(6).

¶5 We also reject Mendez's contention that the court erred by not finding his "mental state and his lack of success at addressing his drug addiction" were mitigating circumstances, particularly in light of his mother's testimony at the sentencing hearing that he had a serious drug problem, which she claimed he had tried to address and for which he had sought help. We assume the court considered the evidence, together with any other evidence relevant to sentencing. *See State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991). But, again, it was for the trial court to assess Mendez's mother's credibility, to determine how much weight to give her comments at sentencing, and ultimately, whether Mendez's substance abuse problem was a mitigating circumstance and whether he had made sincere efforts to address the problem. The mere fact that the evidence was presented did not require the trial court to find it constituted a mitigating circumstance. *See id.; see also State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994) ("[A]lthough [sentencing judges] must consider all evidence offered in mitigation, they are not bound to accept such evidence as mitigating."). The trial court was faced with a defendant who had a lengthy criminal record and who continued to reoffend; he had been provided previous opportunities to address his substance abuse problem. Therefore, even

if this problem is a factor in his repeated commission of criminal offenses, the trial court had the discretion to reject it as a mitigating circumstance.

¶6 Mendez also contends that, given the nonviolent nature of the offenses, the sentences imposed are cruel and unusual and therefore violate the Eighth Amendment of the United States Constitution. But as our supreme court recently stated, "[C]ourts are extremely circumspect in their Eighth Amendment review of prison terms. The Supreme Court has noted that noncapital sentences are subject only to a '"narrow proportionality principle"' that prohibits sentences that are '"grossly disproportionate"' to the crime." *State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006), *quoting Ewing v. California*, 538 U.S. 11, 20, 23, 123 S. Ct. 1179, 1185, 1187 (2003) (O'Connor, J., concurring in the judgment), *quoting Harmelin v. Michigan*, 501 U.S. 957, 996-97, 1001, 111 S. Ct. 2680, 2702-03, 2705 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *see also State v. Davis*, 206 Ariz. 377, ¶¶ 20-23, 79 P.3d 64, 69 (2003). The threshold showing of gross disproportionality requires a comparison of the gravity of the offense to the penalty and its harshness. *Berger*, 212 Ariz. 473, ¶ 12, 134 P.3d at 381. "In comparing the gravity of the offense to the harshness of the penalty, courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Id.* ¶ 13. Mendez has made no threshold showing of gross disproportionality. The legislature presumably knew when it provided the sentences for these crimes that they were not

necessarily violent offenses. We need not, therefore, conduct a full proportionality review pursuant to *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983), as Mendez has asserted.

¶7 Finally, Mendez also contends the court improperly found his lack of remorse an aggravating circumstance, arguing he was entitled to maintain his innocence without being penalized for it. There is authority to support this general proposition.[1] *See State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) ("A defendant is guilty when convicted and if he chooses not to publicly admit his guilt, that is irrelevant to a sentencing determination."); *State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995) ("[I]t would be irrational or disingenuous to expect or require one who maintains his innocence to express contrition or remorse."). But, even assuming the court erred in this regard, the trial court clearly would have imposed the same sentences without that factor, and we have no basis for disturbing the sentences. *See State v. Ramsey*, 211 Ariz. 529, n.7, 124 P.3d 756, 770 n.7 (App. 2005); *see also State v. Ojeda*, 159 Ariz. 560, 561, 769 P.2d 1006, 1007 (1989). After the court sentenced Mendez, defense counsel told the court, "I do believe there is case law remorse is not [an] appropriate aggravator." Although the court's comments indicate it considered lack of remorse an aggravating factor, the court also indicated that it had given the greatest weight to Mendez's lengthy criminal history and prior conviction. Given these comments and the number of aggravating circumstances the court

[1]We note that the court's comments reflected that it found Mendez's attitude to be an aggravating circumstance. Although his attitude is intertwined with his lack of remorse, it is arguably distinguishable.

found, coupled with the fact that the sentence imposed was only two years greater than the presumptive term, we conclude the court clearly would have imposed the same sentences had it not considered Mendez's lack of remorse.

¶8 Affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge